No. 694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

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Appellee moves to dismiss the appeal on the ground that the judgment from which appeal is taken is not final. We anticipated this contention and treated it at page 13, note 2, of the Jurisdictional Statement. A few additional words may be helpful.

1. The judgment is final in fact and form. The injunction entered by the Circuit Court of Jackson County was preceded by a stipulation that "the evidence heretofore introduced herein on November 27 and 28, 1961, may be considered by the Court on both the temporary and *permanent* injunction" (R. 191, emphasis supplied). The decree thereafter entered by the Circuit Court expressly adjudged that appellants "be and they are hereby *permanently* enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (Tr. 192, emphasis supplied). In its ensuing judgment the Missouri Supreme Court ordered that the decree of the Circuit Court "be in all things affirmed, and stand in full force and effect," modifying it only to provide that "the trial court retains jurisdiction of the cause" (Jur. St., p. 1a). Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (Jur. St., pp. 42a, 31a-32a, 33a). The judgment is thus classically final, for it affirms a permanent injunction against a course of conduct, qualifying it only to permit its alteration upon a showing of changed circumstances, and this power of modificaton is inherent in any permanent injunction and exists even when unexpressed.[1]

Montgomery Building & Construction Trades Council v. *Ledbetter Erection Co.*, 344 U.S. 178, upon which appellee relies (p. 4), emphasizes the distinction which

[1] For recent illustrations, in addition to those cited in the Jurisdictional Statement at page 13, note 2, see *Drivers Union, Local 626* v. *United States*, 31 U.S. Law Week 4009, 4011-12, 4013 (S. Ct., Nov. 19, 1962); *Cataldi* v. *Werth*, C.A.D.C., No. 16838, sl. op. p. 3 (Nov. 15, 1962).

confirms the finality of the instant judgment. For in that case appeal was taken from an "interlocutory decree" that "could have been readily converted into a final decree" but was not; had the conversion been made in that case "the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued . . ." (*id.* at 181). And the conversion which would have rendered the judgment appealable "without question" was to transform the injunction from temporary to permanent status. An injunction is temporary when it provides interim relief pending the determination whether a permanent injunction should be granted. "The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity" (*id.* at 180). That elementary distinction leaves no slightest room for doubt that the injunction in this case is classically and traditionally final and permanent. It does not grant interim relief pending decision of a request for a permanent injunction; it is the final grant of the ultimate relief sought.

2. The court below does not in any way intimate that the inherent power to modify a permanent injunction upon a showing of changed circumstances deprives its judgment of its character as a final and determinative disposition of the controversy on the record as it stands. It is therefore unnecessary to invoke the rule that, for "the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final . . . , but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not

subject to further review by a state court . . . ." *Department of Banking* v. *Pink*, 317 U.S. 264, 268.[2] For it is not local practice or the court below, but appellee alone, which calls the judgment "temporary," and appellee derives this appellation exclusively from the power of future modification. The consequence of affixing the "temporary" label to the judgment is, as appellee maintains, to place it "beyond the appellate jurisdiction of this Court" (p. 5). But the consequence of placing the judgment beyond this Court's jurisdiction is to put the question of the validity of the King-Thompson Act outside this Court's reach even though the statute's enforcement by injunctive process abridges federal rights. Plainly the requirement of finality cannot be traduced to mean, as appellee would have it, that there can never be a permanent injunction final enough to call into play this Court's power to decide whether federal rights are violated by the restraint imposed. Not even a mechanical application of the requirement of finality, which this Court traditionally abjures, supports appellee in its game by which it exerts the full power of the King-Thompson Act but seeks to elude a test of the validity of the power it wields.

3. Several other factors show the emptiness of appellee's claim:

(a) Appellee says that, until appellants return to the Governor and the Circuit Court with a claim that the "emergency" has ceased by the lapse of time and the injunction should therefore be vacated, recourse to this Court is premature (pp. 5-6). But this is an endless merry-go-round. For the same logic which

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[2] See also, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 72; *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546-547.

would require the first try would also require a second and third try. Furthermore, on an ultimate appeal to this Court from a refusal to vacate the judgment, appellants might well then be confronted with a formidable claim that the federal questions were foreclosed by res adjudicata through failure to appeal from the original judgment which authoritatively and adversely determined those questions.

(b) Application to the Governor and the Circuit Court can only raise the state question whether by state standards an "emergency" still exists warranting retention of seizure. Such recourse compels acceptance of the state scheme to secure state leave to exercise the federal right to strike. But the objective of this appeal is to be freed on federal grounds from the fetters which the state procedure has fastened on appellants. The gamut of the state procedure having been run once by appellants, the power of the state to impose it at all is now fully ripe for determination. Appellants should not be required to run the gamut twice. No new federal questions can be generated nor old ones elucidated by a second run. Appellants at this writing have for more than thirteen months been enjoined from striking. The time has come to decide the validity of this restraint.

(c) There is no basis upon which to return to the Governor and the Circuit Court to request vacation of the judgment. The same situation continues in being which initially persuaded the Governor, the Circuit Court, and the Missouri Supreme Court to find that by state standards the requisite jeopardy exists to "public interest, health and welfare." Nothing has altered. There is no single differentiating feature which can be even plausibly argued. In the absence of a change

in situation, to request vacation of the judgment would be irresponsible, and, in the bizarre event that the request were seriously entertainable, it would add to the invalidity of the King-Thompson Act by demonstrating the utter capriciousness of its administration. A judgment vacated where nothing has changed gives no assurance that a resumed strike would not after a few days be again enjoined by a fresh institution of seizure. Facing the federal questions now is essential to vindication of the federal rights asserted and is fully compatible with the requirement of finality and "the policy against fragmentary review" (*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 71) which it serves.

Respectfully submitted,

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